STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 12, 2006
v	No. 261837 Wayne Circuit Court
COUNT PIERRE WAGONER, a/k/a COUNT BEY WAGONER, Defendant-Appellant.	LC No. 04-010131-01

Before: Fitzgerald, P.J., and Markey and Talbot, JJ.

PER CURIAM.

The court convicted defendant of felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, second offense, MCL 750.227b, and sentenced him as an habitual offender, second offense, MCL 769.10, to prison terms of seven months to seven years for the felon in possession conviction and five years for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I

Defendant argues that the trial court erred by failing to sua sponte suppress his statement to officer Daniel Bryant on the ground that the statement was the fruit of an illegal arrest or on the ground that the statement was a custodial statement taken in violation of defendant's constitutional rights. Defendant further argues that the trial court erred by failing to sua sponte suppress the fruits of Bryant's search of a van on the ground that the search violated defendant's right to be free of illegal searches and seizures. We disagree with both of defendant's arguments.

Defendant failed to object to the admission of his statement and failed to make a motion to suppress the fruits of the search of the van. Thus, defendant has failed to properly preserve his arguments. See *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004); *People v Gentner, Inc*, 262 Mich App 363, 368; 686 NW2d 752 (2004). This Court reviews unpreserved constitutional issues for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 764; 597 NW2d 130 (1999). A plain error merits reversal only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id.* at 773.

A. The arrest

Bryant testified that he responded to a call regarding a black male firing a gun on the corner of Mackay and East Grixdale. When Bryant arrived at this area he observed defendant, a black male, standing by a white van with its hood open and witnessed defendant shut the hood. Defendant entered the driver's seat of the van, but then exited the van upon seeing Bryant, who was in full uniform. Defendant approached Bryant, and as Bryant was asking defendant whether he had heard any shots in the area, a voice came over Bryant's "prop" radio stating that there was a gun "under the hood of the white van." Defendant then took off running. Bryant and his partners pursued defendant, who jumped into some bushes and lay down before being apprehended.

A police officer may arrest a person without a warrant if a misdemeanor is committed in the officer's presence or if there is reasonable cause to believe a felony was committed and that the person arrested committed it. *People v Manning*, 243 Mich App 615, 622; 624 NW2d 746 (2000). The information that a gun was fired in the location where defendant was observed standing in front of a white van with its hood open and that a gun was under the hood of a white van, when coupled with defendant's flight from the scene, provided reasonable cause that a felony was committed and that defendant committed it. The warrantless arrest of defendant was therefore justified.

B. Defendant's Statement

Bryant placed defendant in the back of his squad car, where defendant remained while he told the police that he had put a gun under the hood of the white van. No evidence was presented that defendant's statement was in response to questions posed by the police. In fact, the evidence established that defendant voluntarily blurted out the statement without any inquiry by the police. Defendant's statement was therefore not made in response to a custodial interrogation. *People v Anderson*, 209 Mich App 527, 532-533; 531 NW2d 780 (1995). Accordingly, the trial judge did not commit plain error when she failed to sua sponte suppress defendant's statement. *People v Daoud*, 462 Mich 621, 633; 614 NW2d 152 (2000).

C. The Search of the Van

Generally, a search conducted without a warrant is unreasonable unless there exists both probable cause and a circumstance establishing an exception to the warrant requirement. *People v Snider*, 239 Mich App 393, 407; 608 NW2d 502 (2000). The prosecutor bears the burden of showing that a search was justified by a recognized exception. *People v Mayes (After Remand)*, 202 Mich App 181, 184; 508 NW2d 161 (1993). Exceptions to the warrant requirement for reasonable searches and seizures include: (1) searches incident to arrest, (2) automobile searches and seizures, (3) plain view seizure, (4) consent, (5) stop and frisk, (6) exigent circumstances, (7) community caretaker, and (8) emergency aid. *People v Davis*, 442 Mich 1, 10; 497 NW2d 910 (1993). In relevant part, when searching incident to an arrest, the police may search the defendant's person and the area within his immediate control. *People v Catanzarite*, 211 Mich App 573, 581; 536 NW2d 570 (1995). Furthermore, upon making a lawful arrest of the occupant of a vehicle, an officer may make a warrantless search of the occupant and the entire passenger compartment of the vehicle. *Id.* A search of a vehicle without a warrant pursuant to the automobile exception is strictly limited in scope by the objects of the search and the places in

which there is probable cause to believe they can be found. *People v Bullock*, 440 Mich 15, 25; 485 NW2d 866 (1992). Probable cause is closely tied to the specific facts of each case. *Id*. at 26. Probable cause to search an automobile exists when the facts and circumstances known to the officers would warrant a person of reasonable prudence to believe that evidence of a crime or contraband sought is in a stated place. *People v Carter*, 194 Mich App 58, 61; 486 NW2d 93 (1992). If probable cause justifies the search, it justifies the search of every part of the vehicle and any of its contents that might conceal the object sought. *Id*.

As previously discussed, defendant was properly arrested and subsequently made an unsolicited statement that he had put a gun under the hood of the van. Bryant's subsequent search under the hood of the van where he had observed defendant standing while the hood of the van was open was based on probable cause and was in an area within defendant's immediate control. *Bullock, supra* at 25-26. The trial court did not commit plain error when it failed to sua sponte suppress the fruits of Bryant's search of the van incident to defendant's arrest.

II

Defendant argues that the trial court erred by failing to sua sponte suppress alleged hearsay testimony. We disagree. Defendant failed to properly preserve this argument by making a hearsay objection to the testimony, *Knox, supra* at 508, and therefore we review this unpreserved claim for plain error. *Carines, supra* at 763.

Bryant's testimony that he responded to the crime scene because "there was supposed to be a black male at the corner, firing a gun," was not offered to prove the truth of the matter asserted. Rather, the testimony stated in Bryant's own words the reason why he responded to the scene in question. Thus, Bryant's testimony is not hearsay, and therefore, the trial judge did not abuse her discretion or commit plain error when she failed to sua sponte suppress the testimony on the ground that it was hearsay. *People v Fisher*, 449 Mich 441, 449-450; 537 NW2d 577 (1995).

Similarly, Bryant's testimony that a voice stating that "there was a gun underneath the van, under the hood of the white van in the corner," came over his radio as he was talking to defendant was not inadmissible hearsay. The statement was not offered to prove the truth of the matter asserted, but rather was offered to show that defendant took off running after he heard the statement on the radio. The trial judge did not commit plain error by failing to sua sponte suppress the testimony. *Fisher, supra* at 449-450.

III

Defendant asserts that insufficient evidence was presented to support his convictions. We review sufficiency of the evidence claims de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). When reviewing a claim that the evidence was insufficient to support the defendant's convictions, we review the evidence presented in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crimes charged were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

To convict a defendant of felony-firearm, the prosecution must establish that "the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Felon in possession of a firearm can be the underlying felony for a felony-firearm conviction. *People v Calloway*, 469 Mich 448, 450, 452; 671 NW2d 733 (2003). To prove the offense of felon in possession of a firearm, the prosecution must establish that a defendant, who has been convicted of a specified felony, possessed a firearm. *People v Tice*, 220 Mich App 47, 50; 558 NW2d 245 (1996); MCL 750.224f. To establish possession of a firearm, the prosecution must show actual possession of the firearm or show constructive possession by establishing that the defendant knew of the firearm's location, that the firearm was accessible to the defendant, and that the defendant had the right to control the firearm. *People v Terry*, 124 Mich App 656, 658, 661, 663; 335 NW2d 116 (1983). Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense. *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993). This Court must afford deference to the trier of fact's special opportunity and ability to determine the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992).

The prosecutor presented evidence that defendant is a previously convicted felon not allowed to possess a firearm under the felon in possession of a firearm statute. *Tice, supra* at 50; MCL 750.224f. Additionally, the prosecutor presented evidence that defendant possessed a firearm. Bryant testified that he observed defendant standing by a white van with its hood open and that he witnessed defendant shut the hood and get in the driver's seat of the van. After Bryant apprehended defendant, defendant told him that he had placed a gun and "other stuff" under the hood of the van. When Bryant opened the hood of the van, he saw and retrieved a chip bag that had a gun inside of it. This evidence is sufficient to allow a rational trier of fact to find that defendant knew of the firearm's location, that the firearm was accessible to defendant, and that defendant had the right to control the firearm. Therefore, viewing the evidence presented in a light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that defendant constructively possessed the gun, *Terry, supra* at 658 661, 663, and that the elements of the charged crimes were met. *Calloway, supra* at 450; *Avant, supra* at 505.

IV

Defendant argues that the trial court erred by failing to sua sponte suppress irrelevant testimony that the police found marijuana under the hood of the van. We review this unpreserved claim for plain error. *Carines, supra* at 763.

All relevant evidence is admissible, except as otherwise provided by the constitutions, rules of evidence, or other rules of the Supreme Court. *People v Taylor*, 252 Mich App 519, 521; 652 NW2d 526 (2002); MRE 402. Relevant evidence is evidence that has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Taylor, supra* at 521; MRE 401.

Bryant testified that upon opening the hood of the van, he found a gun inside of a chip bag and a bag that was full of smaller "ziplocks" of a substance that was later discovered to be marijuana. Testimony that marijuana was found in the vicinity of the gun has a tendency to establish why defendant would have a gun and, in turn, makes it more probable that defendant

had a right to possess the gun. Therefore, the testimony is relevant. *Taylor*, *supra* at 521; MRE 401. And since the prosecution needed to establish that defendant possessed the firearm, the probative value of the testimony is not substantially outweighed by the danger of unfair prejudice. Thus, the trial court did not commit plain error when it failed to sua sponte suppress the questioned marijuana testimony on the ground of irrelevancy or on the ground that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. *Taylor*, *supra* at 521-522. Moreover, a judge, unlike a juror, possesses an understanding of the law that allows him to ignore evidentiary errors and decide the case based solely on evidence that was properly admitted. *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55 (2001). And because sufficient evidence was provided that established defendant's guilt, any error in admitting the evidence is harmless and does not require reversal. *Carines, supra* at 763.

V

Defendant asserts that his convictions violate his constitutional right against double jeopardy. We disagree. A person may be convicted of both felon in possession of a firearm and felony-firearm, and the imposition of punishments for both offenses does not violate the prohibition against double jeopardy. *Calloway*, *supra* at 450, 452.

VI

Defendant maintains that the trial court abused its discretion when it declined to grant his motion for a new trial on the basis of the "momentary innocent possession defense." We disagree. We review a trial court's denial of a motion for a new trial for an abuse of discretion. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). An abuse of discretion exists if an unprejudiced person would find no justification for the ruling made. *People v Geno*, 261 Mich App 624, 631-632; 683 NW2d 687 (2004).

Momentary or brief possession of a weapon resulting from the disarming of a wrongful possessor is a valid defense against a charge of carrying a concealed weapon if the possessor had the intention of delivering the weapon to the police at the earliest possible time. *People v Coffey*, 153 Mich App 311, 315; 395 NW2d 250 (1986), rejected by *People v Hernandez-Garcia*, 266 Mich App 416, 420; 701 NW2d 191 (2005), lv gtd 474 Mich 1000; 708 NW2d 108 (2006). Defendant's motion for new trial was partially based on an argument that he told Bryant that he took his father's gun and placed it under the hood of the van because his mother and father were fighting and he did not want his father to be able to grab the gun. But when defendant testified he never mentioned that he took the gun to protect others or that he was going to take the gun to the police station. Rather, defendant testified that he knew nothing about the gun. Thus, even if the "momentary innocent possession defense" is a valid defense to a carrying a concealed weapon charge, and even if the defense extends to a felon in possession of a firearm charge, the defense as outlined in *Coffey, supra*, is not applicable in this case. The trial court did not abuse its discretion when it denied defendant's motion for a new trial on the basis of the "momentary innocent possession defense."

VI

Finally, defendant argues that he was denied the effective assistance of counsel. We disagree. Because defendant failed to raise this issue in a motion for a new trial or evidentiary

hearing in the trial court, this Court's review is limited to errors apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). To show that counsel's performance was below an objective standard of reasonableness, a defendant must overcome the strong presumption that his counsel's actions constituted sound trial strategy under the circumstances. *Id*. at 302. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, which a court will not review, with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). The failure to present additional evidence only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense that would have affected the outcome of the proceedings. *Id*. Counsel's performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Counsel does not render ineffective assistance by failing to raise futile objections. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Furthermore, trial counsel is not ineffective for failing to make a futile motion or argument. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002).

A

We reject defendant's arguments that he was denied the effective assistance of counsel by defense counsel's failure to obtain a copy of the police report regarding his mother's alleged violation of a personal protection order (PPO) and failure to cross-examine Bryant about the alleged violation. Defendant testified that before the incident at hand took place the police were called to his father's house regarding a call placed by his father about his mother violating a PPO. Defendant stated that the police spoke with his father and made a police report before leaving the premises. However, no other evidence was presented to support a finding that the incident defendant spoke of ever occurred or that the alleged police report exists. Consequently, defendant's arguments are without merit.

B

We also reject defendant's argument that he was denied the effective assistance of counsel when his trial counsel failed to subpoena defendant's father. Defendant has failed to identify what defendant's father would have testified to that would have affected the outcome of the proceedings. Defendant has also failed to rebut the presumption that defense counsel's failure to subpoena and call defendant's father as a witness was sound trial strategy. We cannot conclude that defendant was denied the effective assistance of counsel by defense counsel's failure to subpoena defendant's father. *Toma, supra* at 302-303; *Dixon, supra* at 398.

C

We likewise reject defendant's argument that he was denied his constitutional right to the effective assistance of counsel when his trial counsel failed to "conscientiously protect

[defendant's] interests, un[-]deflected by conflicting considerations." Here, after defendant was convicted of felon in possession of a firearm and felony-firearm, and after defendant's motion for a new trial was denied, but before defendant was sentenced, defense counsel moved to withdraw from his representation of defendant. Defendant correctly points out that, during defense counsel's motion, defense counsel stated, in relevant part:

> I've gone over the probation report, which I thought was very fair under the circumstances. I must say that I agree with the Court on the findings based on the nature of the evidence that we had received from his girlfriend and from the other conflicting items that were before the Court. . . . I haven't been paid a dime on this case . . . I wanted to try to help him. But I do not intend to be abused. . . . Now, the defendant is very upset with me and wouldn't discuss the reports. So I'm not prepared to do this sentence with him and I want to be relieved. . . . The girlfriend come [sic] in here and she gets on the stand and give [sic] the outrageous tail [sic] that she gives to this Court. And certainly all of these inconsistencies in there. Now, if he thinks I'm Houdini or something, I'm not. I'm only to try [sic] to present the facts as they were.

Although defense counsel's remarks were not in defendant's best interest, given the fact that defense counsel's remarks took place after defendant was convicted and after defendant's motion for a new trial had already been denied, we conclude that defense counsel's remarks did not affect the outcome of the proceedings. *Toma, supra* at 302-303.

D

Defendant contends that defense counsel's failure to object in each of the instances identified previously denied him the effective assistance of counsel. Inasmuch as we have found no plain error affecting defendant's substantial rights, defendant was not denied the effective assistance of counsel as counsel is not required to raise futile objections, *Ackerman, supra* at 455, or make futile motions or arguments. *Ish, supra* at 118-119.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Michael J. Talbot